No. 12011

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF JOHN E. BURRELL, DECEASED, ARLEY M. BURRELL, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 22-29) are not officially reported.

JURISDICTION

The petition for review (R. 30-34) involves federal estate taxes for the year 1943. On May 29, 1946, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in the total amount of $2,199.80. (R. 10-14.) Within 90 days thereafter, and on August 26, 1946, the taxpayer filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 871 (a) of the Internal Revenue Code. (R. 3-20.) The decision of the Tax

Court sustaining the deficiency was entered on April 7, 1948. (R. 30.) The case is brought to this Court by a petition for review filed July 6, 1948 (R. 30-34), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Did the Tax Court correctly determine that the value of all property held by decedent and his wife as joint tenants should be included in the gross estate of decedent, where taxpayer failed to prove the applicability of the exception in Section 811 (e) (1) of the Internal Revenue Code?

STATUTE AND REGULATIONS INVOLVED

The applicable statute and Regulations are set forth in the Appendix, *infra*.

STATEMENT

The undisputed facts as found by the Tax Court (R. 23-25) are as follows:

The petitioner is the Estate of John E. Burrell, deceased, who died July 28, 1943, a resident of California. Arley M. Burrell is the duly appointed executrix. The estate tax return was filed with the Collector of Internal Revenue for the Sixth District of California. (R. 23.)

The decedent, John E. Burrell, and Arley M. Burrell were husband and wife, and they resided in the State of California as husband and wife for 30 years prior to decedent's death. (R. 23.)

The decedent was engaged in the general contracting business throughout his married life and his income therefrom was community income. All the properties in the estate of decedent and his widow were derived from the earnings of decedent during their marriage. (R. 23.)

Decedent and his wife, Arley M. Burrell, converted their property into joint tenancy during their marriage, except the portion of their property used in decedent's business. Decedent's gross estate was returned for estate tax purposes as follows (after audit) (R. 23-24):

Stock and bonds	$ 60.00
Insurance	6,827.25
Jointly-owned property	110,147.87
Other property (property used in decedent's business)	17,100.48
	$134,135.60

The foregoing list of property constituted all the property accumulated by decedent and his wife during their married life. (R. 24.)

The total deductions claimed on the return amounted to $29,395.73 (after audit), and included in addition to debts, funeral and administrative expenses, federal and state income taxes assessed prior to the death of decedent, as follows (R. 24):

	Federal Income Taxes Year 1941	Federal Income Taxes Year 1942	California Income Taxes Year 1942
John E. Burrell, husband	$166.00	$9,122.54	$1,055.58
Arley M. Burrell, wife	166.00	9,122.54	1,055.58

The value at the date of decedent's death of property subject to claims was $17,160.48. (R. 24.)

The decedent and his wife filed separate income tax returns with the federal government and the State of California on their respective shares of joint and community income for the years 1941, 1942, and 1943. There were no statutory gifts between the decedent and his wife during decedent's lifetime. (R. 24.)

All the valuations determined by the Commissioner in the estate are correct. The deductions, as determined

by the Commissioner, apart from the issue of deductibility, are correct. (R. 25.)

The estate tax return included among assets of the estate bank accounts held in joint tenancy by the decedent and his wife totaling approximately $40,000. The separate income tax return of the decedent's wife for the year 1942 referred to the income reported as community income and reported a tax of $18,245.06. Her return for the year 1943 showed a tax of $119.36. After the death of the decedent she paid all claims against the estate, and paid a total of $10,344.12 state and federal income taxes for herself for 1941, 1942, and 1943, the amount being included in payments of $4,561.26 on each of the following dates: March 15, 1943; June 15, 1943, September 15, 1943, and December 15, 1943. The actual net worth of the decedent's estate and the amount determined by the Commissioner was $134,135.60. Claims were filed against the estate in the total amount of $29,395.73. Of that amount, the Commissioner, in determining the net estate, allowed $17,160.48, disallowing $1,891.13 of claims itemized as "Debts other than income taxes," and disallowing $10,344.12, the amount of income taxes of the decedent's wife, Arley M. Burrell. (R. 25.)

SUMMARY OF ARGUMENT

Under Section 811(e) of the Internal Revenue Code, the value of all property held by decedent and any other person as joint tenants must be included in the gross estate of decedent except for any portion of the jointly held property which originally belonged to the other person and was not obtained from decedent for less than full and adequate consideration in money or money's worth. The filing of separate returns and the payment by decedent's wife of her own share of the community and joint income taxes was simply a payment of her own obligation, and did not constitute a

contribution to the joint estate. Moreover, taxpayer failed to prove that the payment was made with funds which originally belonged to decedent's wife. Finally, and most important, even if decedent's wife had transferred to her husband something of value which originally belonged to her, this would not constitute consideration for any portion of the joint estate in the absence of proof that the payment was made with the expectation of repayment, and that some portion of the jointly held property represented a liquidation of a promise by decedent to repay. Since the taxpayer failed to sustain the burden of bringing the estate within the exception of Section 811(e)(1), the Tax Court's decision should be sustained and all property held by decedent and his wife as joint tenants must be included in the gross estate.

ARGUMENT

I

The Tax Court correctly determined that all property held by decedent and his wife as joint tenants must be included in decedent's gross estate under Section 811 (e) of the Internal Revenue Code

Section 811 (e) (1) (Appendix, *infra*) provides for the inclusion in the gross estate of the value of all property held as joint tenants by the decedent and any other person—

> * * * except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth * * *.

The undisputed facts disclose that decedent's wife never had any separate property, and that no specific property in decedent's estate had "originally belonged" to her. The taxpayer proposes, however, a theory so

vague and tenuous as to be patently untenable under Section 811 (e) (1) even on cursory examination. Taxpayer argues that the wife incurred a personal liability on behalf of the community by filing separate income tax returns on her own share of the community and joint income with the consequence that a separate property interest in the estate was created in her favor; and that she was a contributor to the joint tenancy by virtue of the conversion of the community property to jointly held property and by virtue of her payment of her share of the income taxes. As the Tax Court indicated, the theory is interesting, principally because it is novel, but it is without substance.

First, the wife contributed neither to the joint estate nor to her husband. Certainly no contribution emanated from her by virtue of the conversion of the community property to jointly held property. If anything, the wife's rights were increased thereby. Nor can she be said to have made a contribution by paying her own income taxes. Since she filed separate returns, she was merely paying her own obligations. This is especially true since the income was both community and joint. It cannot be said that a wife who reaps the benefit of community and joint earnings is contributing to another person when she files a separate return and pays her own share of the tax. Indeed it is clear that legally the obligation was her own, since she filed separate returns. Taxpayer argues that the wife filed separate returns at the direction of her husband; this despite the fact that there is not a shred of evidence in the record to support the statement. Nor can we agree that it is a "natural presumption" that she filed separate returns at his direction. (Pet. Br. 15.) Such "presumption" might conceivably exist if the transaction viewed as a whole appeared to be calculated to benefit the husband. At any rate the burden of proof rested on taxpayer to

overcome the legal presumption in favor of the validity of the Commissioner's determination, and this burden cannot be sustained by conjecture.

Secondly, assuming that the wife could be said to have transferred something of value to her husband or to the joint estate, taxpayer would still have failed to prove that the wife transferred something which "originally belonged" to her. The wife had no separate property. All of the property held jointly by her and decedent was traceable to community property earned by decedent. Treasury Regulations 105, Sec. 81.22 (Appendix, *infra*) provides—

> For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence.

Moreover, the record does not disclose whether she paid the taxes out of income originally earned by the husband before or after July 29, 1927. Income earned prior to that date would in any case be treated as the separate property of the husband with the wife's hav-

ing only a contingent interest in the community property. *United States* v. *Robinson,* 269 U. S. 315; Civil Code of California (1937), Secs. 161, 162, 163, 164, 687. For this reason, it had been held that where property was acquired by decedent and his wife with community property, this did not establish that any part of such property originally belonged to her within the meaning of Section 302 (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253, so as to justify the exclusion of any part of it from the husband's estate. *Melczer* v. *Commissioner,* 23 B. T. A. 124. More recently the Court of Claims held that where money held in joint bank accounts by husband and wife was utilized to pay insurance premiums on policies on the husband's life, all of the proceeds of the policies were included in his gross estate since the taxpayer had "not sustained the burden * * * of proving that the insurance premiums were paid out of community funds acquired after July 29, 1927". *Rule* v. *United States,* 63 F. Supp. 351, 358 (C. Cls., 1945). Thus it is clear that taxpayer did not sustain the burden of proving that the wife had paid the taxes out of funds originally belonging to her.

Finally and most important, even had the wife transferred to her husband something of value originally belonging to her, this would not constitute a consideration for any share of the jointly held property unless the payments were in the nature of loans to the husband accompanied by a promise of repayment. *McGrew's Estate* v. *Commissioner,* 135 F. 2d 158 (C.C.A. 6th). In the *McGrew* case, the wife had previously advanced substantial sums of money to assist her husband in meeting his obligations. Subsequently the husband transferred to his wife a sum of money which she placed in a ~~ojint~~ joint savings account. The Court of Appeals, emphasizing that the burden of proof rested on the taxpayer to bring the estate within the exception

contained in Section 811 (e) (1) of the Internal Revenue Code, upheld the determination of the Board of Tax Appeals that the funds deposited in the joint savings account had not been proved to have been received (p. 162) "in fulfillment of a promise or expectation of repayment of advances made by her to him, or 'for anything else approaching an adequate and full consideration in money or money's worth' ". See also *Fox* v. *Rothensies,* 115 F. 2d 42 (C.C.A. 3d).

As the Tax Court pointed out in this case, no evidence was introduced by the taxpayer tending to show that decedent's wife expected to be reimbursed for the sum she expended in payment of her income taxes, or that any portion of the jointly held property represents a liquidation of a promise by decedent to repay his wife. Taxpayer argues that the Tax Court overlooked certain "salient" facts in this connection. These facts as set out by the taxpayer (Br. 11, 12) are that decedent and his wife filed separate tax returns on their respective shares of joint and community income, that decedent and his wife converted all community property into joint tenancy with the exception of property used in decedent's business, and that the estate tax return included among the assets joint bank accounts totalling $40,000. From these facts taxpayer reasons that the husband provided the means for his wife to pay her taxes by establishing joint accounts, that he intended her estate to suffer no injury, that his generous conduct showed that he didn't intend her to assume a personal liability, and therefore he intended to reimburse her for any taxes paid by her. Needless to point out, there is serious question as to whether taxpayer's conclusions follow from the purportedly "salient" facts. At any rate this highly conjectural type of reasoning would hardly suffice to sustain taxpayer's burden of proving that the decedent intended to reimburse his

wife for her payment of her income taxes or that any portion of the property held jointly by decedent and wife represented a liquidation of a promise by decedent to repay his wife.

Nor is there any merit in the contention that there was an implied contract that the estate would reimburse the wife for payment of her taxes on her own share of community and joint income. Taxpayer cites no authority for the proposition and the sections of the California Code relied upon do not support the contention. It is not conceivable that it would be held that a wife who files separate returns and pays taxes on her own share of joint and community income would in every case be entitled as a matter of law to reimbursement. Under Section 811 (e) (1) the burden is with taxpayer to prove that the wife paid the taxes with the expectation of being repaid and that a portion of the property jointly held represents a liquidation of the promise to repay; in other words taxpayer must prove that the payment of taxes by the wife was intended to be a consideration for an interest in the jointly held property. As previously noted taxpayer introduced no evidence in this connection.

Assuming it be true that the wife has a claim against the estate, a fact which seems very doubtful, nonetheless this would not affect the estate tax liability since it is clear that claims have already been allowed to the full extent that there was property available subject to claim. (R. 24, 25.) See Section 812 (b) (5) of the Internal Revenue Code (Appendix, *infra*).

II

Taxpayer is not entitled to exclude from the estate any portion of the property held jointly by decedent and his wife on any theory of unjust enrichment or any other equitable theory

Taxpayer argues under heading I (Br. 7-10) that decedent's estate was unjustly enriched by virtue of the

fact that all of the jointly held property was included in the estate whereas decedent's wife paid the already accrued income taxes on her share of the community and joint income. Taxpayer further argues that it is inequitable to include in the gross estate the entire value of jointly owned property without allowing an exclusion in the amount of income taxes paid by decedent's wife. Even if it were true that the estate were "unjustly enriched" and that it would be "inequitable" to disallow an exclusion in the amount of the wife's taxes, the argument would have no validity. Section 811 (e) clearly provides for the inclusion in the gross estate of the value of all property held by decedent and another person as joint tenants. The only exception is that specifically provided in subsection (1) namely:

> * * * such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth * * *.

As the Supreme Court pointed out in United States v. Jacobs, 306 U. S. 363, 371—

> It is immaterial that Congress chose to measure the amount of the tax by a percentage of the total value of the property, rather than by a part, or by a set sum for each such change. The wisdom both of the tax and of its measurement was for Congress to determine.

It has been held on many occasions that all property held by decedent and his wife as joint tenants must be included in his gross estate in the absence of proof that any part of the property belonged originally to the wife and was never acquired by her from decedent for less than an adequate consideration in money or money's

worth, and that she did not receive from decedent the consideration with which she acquired her part of the property. *Foster* v. *Commissioner,* 90 F. 2d 486 (C.C.A. 9th). Taxpayer here in effect attempts to establish new standards for the measurement of the estate tax and to broaden the exception specifically provided in Section 811 (e) (1).

CONCLUSION

The value of all property held by the decedent and his wife as joint tenants must be included in his gross estate since taxpayer has failed to sustain the burden of proving the applicability of the exception in Section 811 (e) (1). The judgment of the Tax Court should be affirmed.

Respectfully submitted,

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NOVEMBER, 1948

APPENDIX

INTERNAL REVENUE CODE:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(e) [As amended by Sec. 402(b)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Joint and Community Interests.*—

(1) *Joint Interests.*—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests

are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(26 U. S. C. 1946 ed., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(b) *Expenses, Losses, Indebtedness, and Taxes.* —Such amounts—

* * *

(5) [As amended by Sec. 405(a) of the Revenue Act of 1942, *supra*] * * * There shall be disallowed the amount by which the deduction specified in paragraphs (1), (2), (3), (4), and (5) exceed the value, at the time of the decedent's death, of property subject to claims. * * *

(26 U. S. C., 1946 ed., Sec. 812.)

TREASURY REGULATIONS 105, promulgated under the Internal Revenue Code:

SEC. 81.22 [As amended by T. D. 5239, 1943 Cum. Bull. 1081.] *Property held jointly or by the entirety.* The foregoing provisions of the Internal Revenue Code extend to joint ownerships wherein the right of survivorship exists, regardless of when such ownerships were created. They specifically reach property held jointly by the decedent and any other person or persons, or by the decedent and spouse as tenants by the entirety, or deposited with any person or institution carrying on a banking business in the name of the decedent and any other person and payable to either or the survivor, provided the decedent contributed toward the acquisition of the property so held or deposited, or

acquired it by gift, bequest, devise, or inheritance. Section 811(e) applies to all classes of property, whether real or personal, in case the survivor takes the entire interest therein by right of survivorship and no interest therein forms a part of the decedent's estate for purposes of administration. It has no reference to property held by the decedent and any other person or persons as tenants in common.

The entire property is prima facie a part of the decedent's gross estate. But it is not the intent of the statute that there should so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner should neither have parted with any consideration in its acquirement. Facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

Whether the entire property, or only a part, or none of it, enters into the make-up of the gross estate depends upon the following considerations: (1) So much of the property (whether the whole, or a part thereof) as originally belonged to the other joint owner, and which at no time in the past had been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth, forms no part of the decedent's gross estate. (2) If the facts are otherwise the same as in (1), but the decedent paid to such other joint owner a consideration for the interest by him (the decedent) acquired in the property, then such portion of the property, proportionate to the consideration so paid, constitutes a part of the gross estate. (3) If the property, or a part thereof, or a part of the consideration wherewith it was acquired, had at any time been acquired by the other joint owner from the decedent as a gift, or for less than an adequate and full consideration in money or money's

worth, then such portion of the entire property, proportionate to the consideration, if any, which in the first instance was paid from such other joint owner's own funds, forms no part of the gross estate. (4) If the property was acquired by the decedent and his or her surviving spouse as tenants by the entirety by gift, bequest, devise, or inheritance, then only one-half of the property becomes a part of the gross estate. (5) If the property was acquired by the decedent and the other joint owner as joint tenants by gift, bequest, devise, or inheritance, and their interests are not otherwise specified or fixed by law, then only one-half of the property is a part of the gross estate; or, if so acquired by the decedent and two or more persons, and the interests of the several joint tenants are not otherwise determinable, then the decedent and the other joint tenants surviving him shall be deemed the owners of equal fractional parts, and one only of such fractional parts is to be included in the gross estate.

The following are given as illustrative: (a) If the decedent furnished the entire purchase price, the entire property should be included in the gross estate; (b) if the decedent furnished a part only of the purchase price, only a corresponding portion of the property should be so included; (c) if the decedent, prior to the acquisition of the property by himself and the other joint owner, gave the latter a sum of money which later constituted such other joint owner's entire contribution to the purchase price of the property, the entire property should be included; (d) if the other joint owner, prior to the acquirement of the property, received from the decedent, for less than an adequate and full consideration in money or money's worth, property which thereafter became, as such, or in a converted form, part of the purchase price of the property, the value of the property to be included is to be reduced proportionately to the consideration furnished by the other joint owner in the original transaction; (e) if the decedent fur-

nished no part of the purchase price, no part of the property should be included; (f) if the decedent and spouse acquired the property by will as tenants by the entirety, one-half of the property should be included.

For the purposes of the estate tax, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

For the purpose of determining the taxable portion to be included in accordance with the above rules in the gross estate of a decedent who died after October 21, 1942, where the joint tenancy or tenancy by the entirety was created by the transfer of property held as community property by such decedent and his spouse, such decedent is considered as the original owner of all of the community property so transferred, except such part thereof as may be shown to have been received as compensation for personal services rendered by his spouse or derived originally from such compensation or from such separate property of such spouse. Thus, if in the case of a decedent who died after October 21, 1942, property held as community property by such decedent and his spouse was transferred to themselves as joint tenants or as tenants by the entirety, the entire value of such property at the time of the decedent's death is includible in his gross estate, with the exception stated in the preceding sentence. With respect to the meaning of property derived originally from such compensation or from separate property of the spouse and to the identification required, see section 81.23.

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